

		)	
FEDERAL TRADE COMMISSION,		)	
		)	
	Plaintiff,	)	Case No. 03 C 2540
		)	
	v.	)	Judge James B. Zagel
		)	
BRIAN D. WESTBY,		)	Magistrate Judge Arlander Keys
		)	
	Defendant.	)	
		)	

Plaintiff Federal Trade Commission (“Commission” or “FTC”), pursuant to Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), filed a Complaint for a Permanent Injunction and Other Relief in this matter and motion for a Temporary Restraining Order (“TRO”) and Other Equitable Relief, and for an Order to show cause why a Preliminary Injunction should not be granted pursuant to Rule 65 of the Federal Rules of Civil Procedure.

Having considered the pleadings, declarations, exhibits and memoranda filed in support of the Commission's TRO motion, the Court finds that:

- Defendant Brian D. Westby under Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

4. Weighing the equities and considering the Commission's likelihood of success, this Order is in the public interest;

5. No security is required of any agency of the United States for issuance of a restraining order. *See* Fed. R. Civ. P. 65(c); and

6. Defendant, by agreeing and stipulating to this Order, makes no admission as to the truth of Plaintiff's allegations and specifically denies them. In addition, the stipulation and entry of this Order is not to be construed or deemed a waiver of any claims or defenses that may be raised in this action. Furthermore, the prohibitory and mandatory provisions of this Order shall not be deemed or construed to indicate or establish that the Defendant has committed, or threaten to commit, any act or omission restrained or enjoined by the Court.

#### **DEFINITIONS**

1. "Defendant" means Brian D. Westby.

2. "Plaintiff" means Federal Trade Commission.

3. "Document" is synonymous in meaning and equal in scope to the term, as defined in Federal Rule of Civil Procedure 34(a), and includes writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations from which information can be obtained and translated, if necessary, through detection devices into reasonably usable form. A draft or non-identical copy is a separate document within the meaning of this term.

4. "Asset" or "Assets" means any legal or equitable interest in, right to, or claim to, any real and/or personal property, including without limitation, chattels, goods, instruments, equipment, fixtures, general intangibles, leaseholds, mail or other deliveries, inventory, checks, notes, accounts, credits, contracts, receivables, shares of stock, and all cash, wherever located.

5. "Unsolicited Commercial E-Mail" shall mean any e-mail message that consists of or contains a communication advertising, promoting, soliciting, offering, or offering to sell any product, any service, or any form of donation or charitable contribution, not requested by the addressee or recipient or sent pursuant to a pre-existing business or personal relationship between the sender and the addressee or recipient of the e-mail;

6. "Spoofing" means the practice of disguising an e-mail to make the e-mail appear to come from an address from which it actually did not originate. Spoofing involves placing in the "From" or "Reply-to" lines, or in other portions of e-mail messages, an e-mail address other than the actual sender's address, without the consent or authorization of the user of the e-mail address whose address is spoofed; and

7. "Material" means likely to affect a person's choice of, or conduct regarding, goods or services.

#### **I. INJUNCTION AGAINST MISREPRESENTATIONS**

**IT IS THEREFORE ORDERED** that, in connection with the advertising, promotion, offering or sale of goods or services in commerce, Defendant Brian D. Westby, and any agent, servant, employee, salesperson, affiliate, successor, and any other person or entity in active concert or participation with Defendant who receives actual notice of this Order, is hereby preliminarily restrained and enjoined from making any express or implied representation or omission of material fact that is false or misleading, in any manner, directly or indirectly, to any consumer or entity, including, but not limited to, the following:

- A. Misrepresenting that the subject line of an unsolicited commercial e-mail relates to the contents of the underlying e-mail message;

- B. Misrepresenting that the e-mail address of a recipient of an unsolicited commercial e-mail will, upon request, be removed from any lists of addresses to which future e-mail solicitations will be sent;
- C. Misrepresenting the nature, subject or source of an unsolicited commercial e-mail;
- or
- D. Misrepresenting the nature of any product or service offered or sold.

## **II. INJUNCTION AGAINST SPOOFING**

**IT IS FURTHER ORDERED** that in connection with the advertising, promotion, offering for sale of goods or services in commerce, Defendant, and any agent, servant, employee, salesperson, affiliate, successor, and any other person or entity in active concert or participation with Defendant who receives actual notice of this Order, is hereby preliminarily restrained and enjoined from the practice of “spoofing.”

## **III. PRESERVATION OF RECORDS**

**IT IS FURTHER ORDERED** that Defendant is hereby preliminarily restrained and enjoined from destroying, erasing, mutilating, concealing, altering, transferring or otherwise disposing of, in any manner, directly or indirectly, any documents that relate to the business practices or business or personal finances of Defendant, including, but not limited to, consumer identification or financial information obtained through or as a result of email solicitations, computers, computerized files, storage media (including but not limited to floppy disks, hard drives, cd-roms, zip disks, punch cards, magnetic tape, backup tapes and computer chips) on which information has been saved, any and all equipment needed to read any such material, contracts, accounting data, correspondence (including, but not limited to, electronic

correspondence), advertisements (including, but not limited to, advertisements placed on the World Wide Web), USENET Newsgroup postings, World Wide Web pages, books, written or printed records, handwritten notes, telephone logs, telephone scripts, receipt books, ledgers, personal and business canceled checks and check registers, bank statements, appointment books, copies of federal, state or local business or personal income or property tax returns, or 1099 forms.

#### **IV. MAINTENANCE OF CURRENT BUSINESS RECORDS**

**IT IS FURTHER ORDERED** that Defendant is hereby preliminarily restrained and enjoined from:

- A. Failing to create and maintain documents that, in reasonable detail, accurately, fairly, and completely reflect their incomes, disbursements, transactions, and use of money; and
- B. Creating, operating, or exercising any control over any business entity engaged in the business practices set out in the Complaint, including any partnership, limited partnership, joint venture, sole proprietorship or corporation, without first providing Plaintiff with a written statement disclosing: (1) the name of the business entity; (2) the address and telephone number of the business entity; (3) the names of the business entity's officers, directors, principals, managers and employees; and (4) a detailed description of the business entity's intended activities.

## **V. NON-DISCLOSURE OF CONSUMER LISTS**

**IT IS FURTHER ORDERED** that Defendant is restrained and enjoined from selling, renting, leasing, transferring, or otherwise disclosing the name, address, telephone number, credit card number, bank account number, email address, or other identifying information of any person who submitted such information in response to Defendant's business practices, as set out in the Complaint, at any time prior to entry of this Order, in connection with the advertising, promotion, telemarketing, offering for sale, or sale of any product or service in commerce, *provided however*, that Defendant may disclose such identifying information to a law enforcement agency, or as required by any law, regulation or court order and may use such lists for Defendant's own business operations.

## **VI. CREDIT REPORTS**

**IT IS FURTHER ORDERED** that Plaintiff Commission may obtain credit reports concerning Defendant pursuant to Section 604(a)(1) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(1), and that upon written request, any credit reporting agency from which such reports are requested shall provide them to Plaintiff Commission.

## **VII. DISTRIBUTION OF ORDER BY DEFENDANT**

**IT IS FURTHER ORDERED** that Defendant shall immediately provide a copy of this Order to each affiliate, subsidiary, division, sales entity, successor, assign, officer, director, employee, independent contractor, agent, attorney, spouse and representative of Defendant engaged in the business practices set out in the Complaint, and shall, within ten (10) days from the date of entry of this Order, provide the Commission with a sworn statement that Defendant

has complied with this provision of the Order, which statement shall include the names and addresses of each such person or entity who received a copy of the Order.

#### **VIII. SERVICE UPON PLAINTIFF**

**IT IS FURTHER ORDERED**, with regard to any correspondence or pleadings related to this Order, service on the Commission shall be performed by delivery to the attention of Steven Wernikoff, Federal Trade Commission, 55 E. Monroe St., #1860, Chicago, IL 60603, (312) 960-5634, or by facsimile transmission to (312) 960-5600.

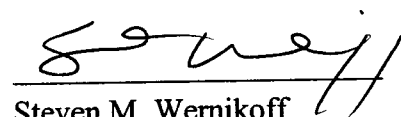
#### **IX. RETENTION OF JURISDICTION**

**IT IS FURTHER ORDERED** that this Court shall retain jurisdiction of this matter for all purposes. No security is required of any agency of the United States for the issuance of a restraining order. Fed. R. Civ. P. 65(c).

#### **STIPULATED AND AGREED TO AS FOLLOWS:**

FOR THE PLAINTIFF:

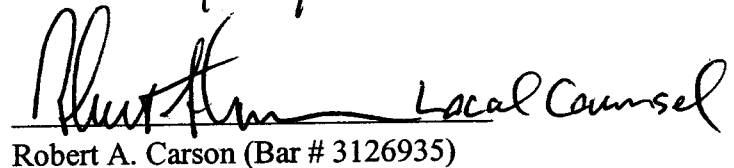
DATED: 4/22/03

  
Steven M. Wernikoff

Federal Trade Commission  
55 East Monroe Street, Suite 1860  
Chicago, Illinois 60603  
(312) 960-5634  
(312) 960-5600 (fax)  
*Attorneys for Plaintiff*

FOR DEFENDANT: BRIAN D. WESTBY

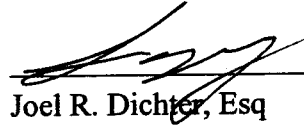
DATED: 4/22/03

  
Robert A. Carson (Bar # 3126935)

Gould & Ratner  
222 North LaSalle Street, Eighth Floor  
Chicago, Illinois 60601  
(312) 236-3003  
(312) 236-3241 (fax)  
*Attorney for Defendant Brian D. Westby*

FOR DEFENDANT BRIAN D. WESTBY

DATED: April 21, 2003



Joel R. Dichter, Esq

Sean A Moynihan, Esq.

*Admissions Pro Hac Vice Pending*

Klein, Zelman, Rothermel & Dichter, L.L.P.

485 Madison Avenue

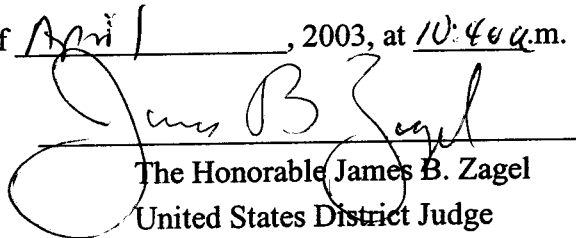
New York, NY 10022

Tel: (212) 935-6020

Fax: (212) 753-8101

*Attorneys for Defendant Brian D. Westby*

SO ORDERED, this 22<sup>nd</sup> day of April, 2003, at 10:40 a.m.



The Honorable James B. Zagel

United States District Judge